Supreme Court, U.S.
FILED
APR 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1550

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM DERR,

Petitioner

v.

KAWASAKI KISEN K.K.,

Respondent

THOMAS ROBERTSON,

Petitioner

v.

TOKAI SHOSEN K.K.,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KEVIN F. BERRY
CARL D. BUCHHOLZ, III
RAWLE & HENDERSON
211 South Broad Street
Philadelphia, PA 19107
(215) 875-4000
Attorneys for Respondents

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

TABLE OF CONTENTS

	Page
Table of Authorities	ii
I. Counter-Statement of the Case	1
II. Argument	2
III. Conclusion	8

TABLE OF AUTHORITIES

Cases: Page

Gill v. Hongo Ship-Owners/AB, 682 F.2d 1070 (4th Cir. 1982) 7

Harris v. Flota Mercante Grancolombiana, S.A., 730 F.2d 296 (5th Cir. 1984) 7

Hurst v. Triad Shipping Company, 554 F.2d 1237 (3d Cir.), *cert. denied*, 434 U.S. 861 (1977) ... 6

Lemon v. Bank Lines, Ltd., 656 F.2d 110 (5th Cir. 1981) 2, 3

Moser v. Texas Trailer Corporation, 623 F.2d 1006 (5th Cir.), *reh'g denied*, 630 F.2d 249 (1980), *appeal after remand*, 694 F.2d 96 (1982) 5

Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156 (1981) 2, 5

Taylor v. Moram Agencies, 739 F.2d 1384 (9th Cir. 1984) 2, 3

Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982) . 2

Statutes:

Longshoremen's and Harbor Workers Compensation Act, Section 5(b), 33 U.S.C. Section 905(b) 4

Authorities:

Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, House Report No. 92-1441 4

Restatement (Second) of Torts, Section 412 5

NO. 87-1550

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM DERR,

Petitioner

v.

KAWASAKI KISEN K.K.,

Respondent

THOMAS ROBERTSON,

Petitioner

v.

TOKAI SHOSEN K.K.,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. COUNTER-STATEMENT OF THE CASE

A. *Procedural Background*

The Petition accurately states the procedural background of the cases.

B. *Factual Background*

For purposes of deciding the propriety of review of the Third Circuit Court opinion in these matters only, respondents agree the Petition accurately states the factual background of the cases.

II. ARGUMENT

A. *The Petition Should Not Be Granted Because There Is No Conflict Among The Circuits As To The Controlling Legal Principles.*

The legal standard which has governed the rulings of the Courts of Appeals and the District Courts with respect to the duty owed a longshoreman by a vessel owner during cargo operations has developed in a logical and consistent manner following this Court's opinion in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981). Indeed, the differences which petitioners wish to create between the opinions of the Ninth Circuit Court in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), and the Fifth Circuit Court in *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), on the one hand, and the Third Circuit Court opinion in these cases on the other ignores factual distinctions among the cases and the subsequent decision of the Ninth Circuit Court in *Taylor v. Moram Agencies*, 739 F.2d 1384, (9th Cir. 1984), limiting the scope of the *Turner* holding.

Although the Third Circuit Court below rejected the "analysis" of the Ninth Circuit Court in *Turner*, the Court also distinguished *Turner* on its facts. Unlike *Turner*, the *Derr* and *Robertson* cases presented no evidence that the vessel owner exercised any control or supervision over the loading of the lumber and/or steel coils which allegedly injured the respective longshoremen. (3a). Moreover, there was no evidence of any custom at the respective loading ports which would have

required the Masters or crew to be responsible for supervising cargo operations. (8a-9a).

Petitioners' reference to the holding in *Turner* is also notable in its failure to include one operative word: "concealed". (14a). The Ninth Circuit Court in *Turner* held "that the vessel had a duty to protect the plaintiff against *concealed* dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of." (emphasis added; footnote omitted), 651 F.2d at 1304. In fact, the Third Circuit Court below noted that the Ninth Circuit has limited *Turner* to concealed dangers, (11a), citing *Taylor v. Moram Agencies*, 739 F.2d 1384, 1387 (9th Cir. 1984). The conditions which allegedly caused the injuries of *Derr* and *Robertson* were not concealed. The condition of the stowed lumber in *Derr*, specifically the fact that it had shifted and was stowed without shoring, was open and obvious to the longshoremen when they entered the vessel's hatch. (4a). Likewise, any movement of the steel coils in *Robertson* was apparent to all who entered the hatch upon the vessel's arrival in the port of Philadelphia. (11a).

The open and obvious nature of the condition of the cargo in these cases also distinguishes them from *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981). In *Lemon*, the Fifth Circuit Court held that the vessel could be held liable for injuries to an injured longshoreman if it had actual knowledge of the improper loading technique and failed either to correct it or warn of it. In *Derr* and *Robertson*, there was no evidence owners had actual notice of any improper loading technique, and any warning was obviated by the longshoreman's appreciation of the condition of the stow at the commencement of stevedoring operations.

B. *The Petition Should Not Be Granted Because There Is No Conflict Between The Opinion Below And The Principles Set Forth In The Legislative History Of The 1972 Amendments To The Longshoremen's And Harbor Workers' Compensation Act.*

Contrary to the position advanced by petitioners, the Third Circuit Court in these cases fully considered the legislative history of the 1972 Amendments and the Court's opinion is consonant with the principles set forth therein. (4a-7a). The legislative history cited in the petition of Derr and Robertson omits a relevant and somewhat lengthy discussion by the House Committee on Education and Labor (18). In that discussion, the Committee "rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by [longshoremen]." (76a). The Committee also rejected imposition of absolute liability on the part of vessels to longshoremen injured on the vessel and opined that any "liability of vessels as third parties, . . . be predicated on negligence". (78a-79a).

Petitioners' argument that the prohibition on holding a vessel vicariously liable for a stevedore's negligence is somehow limited to the negligence of the injured longshoreman's employer is disingenuous and belies the principles underlying the 1972 Amendments. Petitioners would readily admit that a vessel has no duty to supervise cargo operations of their employers, loading stevedores in Philadelphia; and yet, they would seek to hold the vessels responsible for injuries sustained by longshoremen at the subsequent ports of call, for any dangerous condition created by the Philadelphia stevedores. Petitioners offer no genesis for the duty owed to the longshoremen in the subsequent ports and the legislative history to the 1972 Amendments offers no support for such a duty.

Petitioners' position that such a duty exists is born of necessity because of the presumed impediments in

bringing a cause of action against a foreign loading stevedore. Imposing vicarious responsibility on the part of the vessel for the negligent acts of a foreign stevedore in order to overcome those impediments, however, is patently at odds with the intent of Congress in enacting the 1972 Amendments. The Third Circuit Court below agreed with the trial judge in *Robertson* that to adopt petitioners' view would " 'eviscerate' *Scindia* and the Act: 'while the vessel would not be required to supervise and inspect each stevedoring operation . . . it would be held to such a requirement at each subsequent port which encountered the stow.' " (10a). The Third Circuit Court's approach is therefore fully consonant with the principles set forth in the legislative history to the 1972 Amendments.

Finally, petitioners' reliance on §412 of the Restatement (Second) of Torts is also misplaced. It simply does not apply, nor was it ever intended to apply, to cargo. *Moser v. Texas Trailer Corporation*, 623 F.2d 1006, 1015, (5th Cir.), *reh'g. denied*, 630 F.2d 249 (1980), *appeal after remand*, 694 F.2d 96 (1982). Moreover, this Court has specifically eschewed reliance on the Restatement (Second) of Torts in suits by longshoremen against vessel owners both because the legislative history conspicuously omitted reference to it and because land-based legal principles are of limited guidance in the maritime context. *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 154, 167 n.14 (1981).

C. *The Petition Should Not Be Granted Because The Third Circuit Opinion Below Is Consistent With* Scindia Steam Navigation Co., Ltd. v. De Los Santos *With Respect To The Effect Of Custom In The Maritime Industry On The Vessel's Duty Of Care.*

The duties which a shipowner owes to longshoremen set forth by this court in *Scindia*, did *not* include a

duty to supervise cargo operations because the shipowner is entitled to rely on the stevedore to perform its work competently. 451 U.S. at 172. An injured longshoreman could offer evidence of "custom", however, to alter the general scheme of no duty. Petitioner-Derr has argued that the Third Circuit Court failed to recognize the "custom" exception.

Contrary to Derr's assertion, the Third Circuit Court acknowledged Derr offered evidence suggesting a crewmember may have been present during the loading operation. The Third Circuit Court correctly recognized, however, that evidence of such "custom" cannot be used to saddle the shipowner with a general duty to supervise the work of the loading stevedore. The Court observed: [w]e agree with the District Court that such observation of cargo operations by the crew cannot be used to reimpose the general duty to supervise the stevedore. Nor can such observation be vaulted into the type of active involvement and control that would trigger the ship's liability." (citations omitted) (9a).

At trial, the District Court's rejected Captain Ouidyk's testimony in *Derr* because of his lack of knowledge concerning "custom" in the loading ports. The District Court also observed that any evidence that vessel's officers routinely observed cargo operations is not sufficient to give rise to a general duty to inspect all cargo operations on board the vessel in derogation of the duty set forth in *Scindia*.

In its opinion below, the Third Circuit Court took that analysis one step further and indicated that, even assuming there was a general custom in the maritime industry which included observation of cargo operations by the crew, such evidence is insufficient to establish the type of control necessary to affix liability on the vessel owner. *Hurst v. Triad Shipping Company*, 554 F.2d 1237, 1249 n.35 (3rd Cir.), *cert. denied*, 434 U.S. 861 (1977). The Third Circuit therefore concluded that, assuming Ouidyk's testimony was sufficient evidence of

"custom", the "custom" established by Ouidyk was not of the nature to impose any general duty on the part of the vessel to supervise and control the activities of the loading stevedore. There is nothing in the Third Circuit Court opinion which is inconsistent with the principles set forth in *Scindia* as it relates to custom.

D. *The Third Circuit Opinion Below Is Consistent With* Scindia's *Reading Of The Vessel's Duty With Regard To Work Space On The Vessel.*

Petitioners' seek to reverse the entire holding of *Scindia* by redefining the term "work space" to include cargo loaded into the ship by an independent contractor. This is a clear example of the tail wagging the dog. Creating a duty on the part of the shipowner for cargo stowed in the hold of the vessel because, once stowed, the cargo would become part of the "work space" for the next port's stevedore, is simply recasting the arguments set forth in sections I and II of petitioners' Brief in another light. Respondents therefore rely on their responses to those arguments.

Moreover, *Harris v. Flota Mercante Grancolombiana S.A.*, 730 F.2d 296 (5th Cir. 1984), and *Gill v. Hongo Ship-Owners/AB*, 682 F.2d 1070 (4th Cir. 1982), offer petitioners no assistance. *Harris* involved a claim of defective stow of coffee beans loaded by the vessel's crew; no independent stevedore was hired to perform cargo operations at the loading port. 730 F.2d at 299. *Gill* also involved cargo loaded by the ship's crew. 682 F.2d at 1072, 1075. The duties of the vessels in *Harris* and *Gill* were based on actions by shipowners which were contrary to the customary method of employing independent expert stevedores for cargo operations. The *Harris* and *Gill* holdings did not arise from inclusion of cargo in the term "work space", but rather from a finding of active involvement in cargo operations by the vessel's crew, which involvement may have been done negligently.

III. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Kevin F. Berry
Carl D. Buchholz, III
RAWLE & HENDERSON
Attorneys for Respondents
211 South Broad Street
Philadelphia, PA 19107
(215) 875-4000

CERTIFICATE OF SERVICE

Kevin F. Berry, Esquire and Carl D. Buchholz, III, Esquire, attorneys for respondents certify that they served a copy of this Joint Brief in Opposition to Petition for Writ of Certiorari upon Petitioners' attorney, Charles Sovel, Esquire, Lafayette Building, 8th Floor, 5th & Chestnut Streets, Philadelphia, Pennsylvania 19106 on the 15th of April, 1988, by regular U.S. Mail.

Kevin F. Berry, Esquire
Carl D. Buchholz, Esquire